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<b>K.E., Appellant</b>	)	
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<b>and</b>	)	<b>Docket No. 10-1211</b>
	)	<b>Issued: April 14, 2011</b>
<b>DEPARTMENT OF THE ARMY, CORPS OF</b>	)	
<b>ENGINEERS, Seattle, WA, Employer</b>	)	
	)	

### Case Submitted on the Record

**Before:**  
**RICHARD J. DASCHBACH**, Chief Judge  
**COLLEEN DUFFY KIKO**, Judge  
**MICHAEL E. GROOM**, Alternate Judge

On March 22, 2010 appellant, through her attorney, filed a timely appeal from a September 25, 2009 merit decision of the Office of Workers' Compensation Programs reducing her compensation benefits.<sup>1</sup> Pursuant to the Federal Employees' Compensation Act<sup>2</sup> and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## **ISSUE**

The issue is whether the Office properly reduced appellant's compensation to zero based on its retroactive finding that her actual earnings as a modified biologist effective August 28, 2007 fairly and reasonably represented her wage-earning capacity.

## **FACTUAL HISTORY**

On November 14, 2005 appellant, then a 40-year-old biologist, filed a claim for an injury to her left knee and left palm occurring on October 27, 2005 in the performance of duty. The Office accepted her claim for a left contusion of the knee and lower leg, a left knee and leg sprain/strain and chondromalacia of the left patella. Appellant underwent an abrasion chondroplasty of the patellofemoral joint and a patellar plasty on April 25, 2006. On December 8, 2006 she underwent a partial medial meniscectomy and scar revision of the left knee.

By decision dated February 5, 2008, the Office reduced appellant's compensation to zero based on its finding that her actual earnings as a modified biologist effective August 28, 2007 fairly and reasonably represented her wage-earning capacity. She requested an oral hearing. Following a preliminary review, on June 26, 2008 an Office hearing representative vacated the June 26, 2008 decision. Appellant instructed the Office to obtain information from the employing establishment regarding her pay rate and a description of the duties of a modified biologist.

In a decision dated July 30, 2008, the Office again reduced appellant's compensation to zero after finding that her actual earnings as a modified biologist beginning August 28, 2007 fairly and reasonably represented her work injury.

On July 31, 2008 the employing establishment noted that medical evidence dated July 15, 2008 indicated that appellant was unable to perform the duties of her position due to her October 27, 2005 work injury.<sup>3</sup> It offered her another position in accordance with her new physical restrictions.

On August 4, 2008 appellant filed a claim (Form CA-7) requesting compensation from July 28 to 29, 2008. On August 4, 2008 she also filed a notice of recurrence of disability (Form CA-2a) commencing July 25, 2008 causally related to her October 27, 2005 employment injury. Appellant saw her physician on July 16, 2008 and he restricted the number of days that she could

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<sup>3</sup> In a July 15, 2008 work restriction evaluation, Dr. Robert W. Kunkle, a Board-certified orthopedic surgeon, listed work restrictions, including operating a motor vehicle one and a half to two hours going to and from work. On August 14, 2008 he diagnosed severe post-traumatic chondromalacia patella due to patellar fracture. Dr. Kunkle advised that appellant was "unable to drive more than 30 minutes at a time without significant discomfort and pain and decreased function of that lower extremity."

work. She also stated that, due to a change in work hours, she was unable to take mass transit to work and could not operate a motor vehicle over one and a half to two hours.<sup>4</sup>

By letter dated August 11, 2008, the Office informed appellant that it was not going to take further action on her notice of recurrence of disability. It noted that the evidence was insufficient to establish that she was unable to work from July 28 to 29, 2008 and allotted her 30 days to submit evidence showing that she was disabled during this period.

On August 28, 2008 appellant, through her attorney, requested an oral hearing on the July 30, 2008 loss of wage-earning capacity determination.

By decision dated October 10, 2008, the Office denied appellant's claim for compensation on July 28 and 29, 2008. It found that the medical evidence was insufficient to warrant modification of the established loss of wage-earning capacity determination.

On October 30, 2008 appellant's representative requested reconsideration of the October 10, 2008 decision. He asserted that the Office issued the July 30, 2008 wage-earning capacity decision even though appellant had filed a notice of recurrence of disability and claim for compensation beginning July 28, 2008.

In a decision dated December 10, 2008, following a preliminary review, an Office hearing representative vacated the July 30, 2008 wage-earning capacity determination. She found that the Office had not obtained detailed information about appellant's modified duties or her pay rate. The hearing representative remanded the case for additional development. She further also noted that appellant had stopped work and stated, "Additional development of the case file record is ongoing due to a new job offer that was provided to [appellant] on July 31, 2008. According to the evidence of record, [she] refused the offer and requested compensation for wage loss. Supportive medical evidence is in the file."

By decision dated February 13, 2009, the Office reduced appellant's compensation to zero based on its finding that her actual earnings as a modified biologist effective August 28, 2007 fairly and reasonably represented her wage-earning capacity.

In a decision dated February 25, 2009, the Office denied modification of its October 10, 2008 decision denying compensation for July 28 and 29, 2008. It found that the evidence was insufficient to warrant modification of the loss of wage-earning capacity determination.

On March 12, 2009 appellant requested an oral hearing on the February 13, 2009 wage-earning capacity determination.<sup>5</sup> A telephone hearing was held on July 9, 2009.

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<sup>4</sup> On the reverse side of the Form CA-2a, the employing establishment maintained that appellant chose to work a 10.5-hour per day schedule. As she was unable to drive it "brought her back to [five] days a week [eight-hour] shifts to accommodate her restrictions."

<sup>5</sup> The record indicates that appellant resigned from the employing establishment effective December 1, 2008 as she was unable to commute to work due to her injury.

In a decision dated September 25, 2009, the Office hearing representative affirmed the February 13, 2009 decision. She found that the question of whether appellant's condition changed in July 2008 such that the wage-earning capacity determination should be modified was "a separate matter and has been addressed by the [O]ffice as part of other decisions."

On appeal, appellant's representative noted that the December 10, 2008 hearing representative's decision vacated the July 30, 2008 wage-earning capacity determination such that it no longer existed. Consequently, the Office erred in requiring appellant to show a material worsening of her condition to receive compensation for disability. The representative further argued that the Office failed to consider all of the medical evidence in issuing its February 13, 2009 wage-earning capacity determination. He asserts that appellant could refuse a job offer if she was unable to travel due to her work injury.

### **LEGAL PRECEDENT**

Section 8115(a) of the Act<sup>6</sup> provides that, in determining compensation for partial disability, the wage-earning capacity of an employee is determined by her actual earnings if her actual earnings fairly and reasonably represent her wage-earning capacity.<sup>7</sup> Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such a measure.<sup>8</sup> In addition, the Federal (FECA) Procedure Manual provides that the Office can make a retroactive wage-earning capacity determination if appellant worked in the position for at least 60 days, the position fairly and reasonably represented her wage-earning capacity and the work stoppage did not occur because of any change in the injury-related condition affecting the ability to work.<sup>9</sup> The Board has concurred that the Office may perform a retroactive wage-earning capacity determination in accordance with its procedures.<sup>10</sup>

The Board has held that it is inappropriate to issue a retroactive wage-earning capacity determination when there is a pending claim for compensation from the time of the work stoppage.<sup>11</sup> In cases where appellant ceases work after reemployment and the Office has not issued a formal loss of wage-earning capacity (LWEC) determination, the Office's procedure manual provides as follows:

"If no formal LWEC decision has been issued, the CE [claims examiner] must ask [appellant] to state his or her reasons for ceasing work and make a suitability determination on the job in question. If the job is considered suitable, the CE then

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<sup>6</sup> 5 U.S.C. §§ 8101-8193.

<sup>7</sup> *Id.* at § 8115(a); *Loni J. Cleveland*, 52 ECAB 171 (2000).

<sup>8</sup> *Lottie M. Williams*, 56 ECAB 302 (2005).

<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7 (May 1997).

<sup>10</sup> *See Tamra McCauley*, 51 ECAB 375 (2000).

<sup>11</sup> *Juan A. DeJesus*, 54 ECAB 721 (2003).

advises [appellant] that he or she has the burden of proving total disability after return to work and invite [appellant] to submit a Form CA-2a--

(1) If the reasons stated by [appellant] amount to an argument for a recurrence, the CE should develop and evaluate the medical and factual evidence upon receipt of Form CA-2a.”<sup>12</sup>

### ANALYSIS

The Office accepted that appellant sustained a left knee and leg contusion, a left knee and leg sprain/strain and chondromalacia of the left patella due to an October 27, 2005 employment injury. Following appellant's injury she returned to work as a modified biologist. In decisions dated February 5 and July 30, 2008, the Office reduced her compensation after finding that her actual earnings as a modified biologist effective August 28, 2007 fairly and reasonably represented her wage-earning capacity; however, an Office hearing representative subsequently vacated both decisions.

On August 4, 2008 appellant filed a notice of recurrence of disability commencing July 25, 2008 causally related to her October 27, 2005 employment injury. On August 4, 2008 she also filed a claim for compensation from July 28 to 29, 2008. On August 11, 2008 the Office advised that it was not taking action on the notice of recurrence of disability. By decision dated October 10, 2008, it denied appellant's claim for compensation from July 28 to 29, 2008 after finding that she had not established modification of the established wage-earning capacity determination. On February 25, 2009 the Office again denied modification of its October 10, 2008 decision. Subsequent to the October 10, 2008 decision, however, a hearing representative vacated the July 30, 2008 wage-earning capacity determination. Consequently, the Office improperly adjudicated appellant's claim for compensation from July 28 to 29, 2008 under the standard that she needed to establish modification of an established wage-earning capacity determination to show disability from employment. It failed to adjudicate the notice of recurrence of disability beginning July 28, 2008 and continuing.

On February 13, 2009 the Office retroactively reduced appellant's compensation to zero after determining that her actual earnings beginning August 28, 2007 fairly and reasonably represented her wage-earning capacity. On September 25, 2009 an Office hearing representative affirmed the February 13, 2009 decision. The Office, however, issued its February 13, 2009 wage-earning capacity determination after it received evidence that appellant had stopped work and before it had properly adjudicated whether her work stoppage occurred due to a recurrence of disability. As the Board held in *William M. Bailey*,<sup>13</sup> it is inappropriate to issue a retroactive wage-earning capacity determination when there is a pending claim for compensation. Instead, the Office should make a suitability determination on the job in question and request information from appellant regarding the change in her condition.<sup>14</sup> It should then develop the record

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<sup>12</sup> See *supra* note 9 at Chapter 2.814.9(b) (December 1995).

<sup>13</sup> 51 ECAB 197 (1999).

<sup>14</sup> See *supra* note 12.

appropriately prior to the issuance of the retroactive wage-earning capacity determination. The Board finds that the Office did not properly determine appellant's wage-earning capacity based on her actual earnings effective August 28, 2007.

**CONCLUSION**

The Board finds that the Office improperly reduced appellant's compensation to zero based on its retroactive finding that her actual earnings as a modified biologist effective August 28, 2007 fairly and reasonably represented her wage-earning capacity.

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 25, 2009 decision of the Office of Workers' Compensation Programs is reversed.

Issued: April 14, 2011  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board